87-184

Supreme Court, U.S.
FILED
JUL 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

THOMAS L. SCHARFFE, D.P.M.,
Petitioner,

-v-

BETTY L. PERKINS and HARRY A. PERKINS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. DOES A FINDING OF RECKLESS DISREGARD IN A MEDICAL MALPRACTICE ACTION RENDER SUCH CLAIM NONDISCHARGEABLE IN BANKRUPTCY UNDER THE PROVISIONS OF 11 U.S.C. 523(a)(6)?

2. MAY A FEDERAL COURT OF APPEALS REVERSE A FINDING OF NONDISCHARGEABILITY UNDER THE PROVISIONS OF 11 U.S.C. 523(a)(6) UNLESS THOSE FINDINGS ARE CLEARLY ERRONEOUS?

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LIST OF PARTIES

The parties to the proceedings below were the Petitioner THOMAS L. SCHARFFE, D.P.M. and Respondents BETTY L. PERKINS and HARRY A. PERKINS.

The Respondents before this Court are BETTY L. PERKINS and HARRY A. PERKINS.

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3 Collier on Bankruptcy, 15th Ed, 523-118-119, (1986) 5, 7

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-v-

BETTY L. PERKINS and HARRY A. PERKINS, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner THOMAS L. SCHARFFE, D.P.M. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled proceeding on May 5, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not yet been reported and is reprinted in the appendix hereto, p.1a, infra.

The opinion of the United States District Court for the Eastern District of Michigan Southern Division (Judge Horace C. Gilmore) has not been reported. It is reprinted in the appendix hereto p.16a, infra.

The memorandum, opinion and order of the United States Bankruptcy Court for the Eastern District of Michigan Southern Division (Judge Stanley B. Bernstein) has not been reported. It is reprinted in the appendix hereto, p.7a, infra.

JURISDICTION

Federal Jurisdiction was invoked when Petitioner filed a petition for bankruptcy protection pursuant to Title 11 of the United States Code, §101 et sequential. Respondent BETTY PERKINS and HARRY A. PERKINS filed an adversary pro-

ceeding pursuant to the Bankruptcy Code to have the indebtedness of Petitioner determined nondischargeable in bankruptcy pursuant to 11 U.S.C. 523(a)(6). The Bankruptcy Judge Stanley B. Bernstein found the debt to be dischargeable and entered the memorandum, opinion and order on August 3, 1984. See p. 31.

On respondents appeal, Judge Gilmore on August 25, 1985, in his opinion from the bench, as set out at p. 39 entered a judgment and opinion affirming the Bankruptcy Court's determination that the debt was dischargeable. Respondent then appealed to the United States Court of Appeals for the Sixth Circuit and the Court, in an opinion decided and filed May 5, 1987, reversed the decision of the District Court. See p. 25. No petition for rehearing was sought.

The jurisdiction of the Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. §2101.

STATUTE INVOLVED

11 U.S.C. 523(a)(6).

A discharge in bankruptcy does not discharge an individual debtor from any debt — (6) for willful and malicious injury by the Debtor.

STATEMENT OF THE CASE

Petitioner has been a practicing podiatrist in rural upstate Michigan for 17 years. In 1983, he instituted a voluntary petition for bankruptcy pursuant to 11 U.S.C. 101 et seq. Among the debts, the bankruptcy petition sought discharged was that of BETTY and HARRY PERKINS, Respondents herein, who had in 1981 filed a medical malpractice complaint in the State Court, that being Bay County Circuit Court. Subsequent to the filing of the bankruptcy, a consent judgment was entered into in the Bay County Circuit Court fixing the amount of damages at a sum certain and left the issue as to whether or not the debt was dischargeable in bankruptcy for the Bankruptcy Court.

Respondents then filed an adversary proceeding in the pending bankruptcy proceeding to have the matter heard by the Bankruptcy Court in a decision as to the dischargeability issue.

At a trial of the matter, which was held on May 4, 1984 and June 28, 1984, the Bankruptcy Court Judge Stanley B. Bernstein found in favor of Petitioner and entered the memorandum, opinion and order determining the debt to be dischargeable pursuant to the Bankruptcy Code.

Respondents PERKINS then appealed the opinion and order of the Bankruptcy Court Judge to the United States District Court for the Eastern District of Michigan Southern Division.

On August 25, 1985, Federal District Judge Horace Gilmore upheld the Bankruptcy Court's decision affirming that decision as being a correct interpretation of 11 U.S.C. 523(a)(6).

Respondents then appealed to the United States Court of Appeals for the Sixth Circuit. However, DR. SCHARFFE, due to serious financial problems was unable at that time to retain counsel to properly respond to the arguments made on appeal.

In its appeal brief, Respondents made numerous erroneous statements of both the facts and the law which will be pointed out at length should the Court elect to grant Petitioner's request for Writ Of Certiorari.

At the Circuit Court of Appeals level, the Respondents asked the Sixth Circuit Court to overrule what was clearly a factual decision by the Bankruptcy Court.

The central issue that is presented at all levels in this proceeding is and has been whether or not medical/podiatric treatment such as that rendered by Petitioner to Respondent BETTY PERKINS is dischargeable in bankruptcy pursuant to 11 U.S.C 523 (a)(6).

Respondents were given the opportunity in the proceedings before Judge Bernstein to prove that the indebtedness to the Debtor by DR. SCHARFFE was of the nature so as to be nondischargeable under the Bankruptcy Code.

Judge Bernstein heard all the testimony, listened to all the witnesses and reviewed all the exhibits. In his memorandum opinion he held:

> "The record in this proceeding supports the finding the Debtor caused the infection by injecting an unsterile needle into the deep tissue of MRS. PERKINS' foot and that his treatment of that infection did not meet the appropriate standard of care. He failed to test the infected area in a timely manner; he failed to prescribe the drugs of choice required by the laboratory analysis; and he failed to hospitalize the Plaintiff. From further laboratory analysis showed that only hospital strength antibiotics administered intravenously could combat the virulent infections. This Court therefore finds that the Plaintiff's injuries were caused by the Debtor and that under the tort law of this State, they are entitled to damages."
>
> "No evidence was, however admitted, to support the finding that the Debtor intended to harm MRS. PERKINS. Proof that the Debtor injected an unsterile syringe and prescribed the inaffective medications does not prove wilful and malicious injury. It was not the intent to inject the syringe or prescribe the medications as satisfied this statute. It was the intent to cause harm that has to be proven.
>
> Although this Court may regard the Debtor's treatment of this Plaintiff to be absolutely appalling, that conduct did not rise to a level of an intentional tort contemplated in 523(a)(6)."

Petitioner throughout these pleadings will emphasize the fact over and over again that Judge Bernstein's well reasoned opinion should be controlling.

As Judge Bernstein's stated in summing up his opinion:

> "The Bankruptcy Code makes no special provision for the nondischargeability for damages caused by negligence. That policy may be ill advised but as the law, it presently stands." See *Foell v Hungate.* (In RE Hungate, 2 Bankruptcy Report, CT Dec. 1046) (Bankruptcy E.D. Mich 1965). Consent Judgment entered into between these Plaintiffs and the Debtor is determined to be dischargeable."

The Court of Appeals, in its decision, reversed Judge Bernstein and Judge Gilmore in holding:

> "We find the facts in the case before us are very similar to the facts before the Court in *Franklin* and we therefore reach the same conclusion as did the Court in that case."
>
> "Our opinion is reinforced by the latest bankruptcy treatise which states:
>
> > 'In order to fall within the section of 523(a)(6) the injury to an entity or property must have been wilful and malicious. An injury to an entity or property may be a malicious injury within its provision if it is wrongful without just cause or excessive even in the absence of personal hatreds, spite or ill will. The word wilful means deliberate or intentional. A deliberate or intentional act which necessarily leads to injury. Therefore, a lawful act unintentionally which necessarily produces harm without just cause or excuse may constitute a wilful and malicious injury." 3 Collier on Bankruptcy 523-111 (15th Edition, 1986).'
>
> For the reasons given above, decision of the District Court is reversed."

However, the Court of Appeals in its infinite wisdom nowhere states what facts it relies upon for its holding. A bold conclusion is stated without the logical steps on how that conclusion was reached. In addition, as earlier mentioned, there was no response on appeal by Petitioner, DR. SCHARFFE.

REASONS FOR GRANTING THE WRIT

I.

The Sixth Circuit's nondischargeability doctrine denies the protection of the bankruptcy act for debts which Congress has intended to be dischargeable and conflicts with decisions of this Court and other Circuits as well as the Lower Court.

The Sixth Circuit has decided to dispose of the clear and unambiguous intent of the Congress of the United States when it codified the Bankruptcy Act in its present form as the Bankruptcy Reform Act of 1978.

The issue in its most simplified form before the Court is whether or not the facts herein are sufficient within the statutory language so as to have the debt declared nondischargeable and judgment issued thereon. See 11 U.S.C. 523(a)(6). The current statute was previously codified in the Bankruptcy Act of 1898 as amended under Section 17(a)(2) which read in its pertinent part:

> "A discharge from bankruptcy shall release from bankrupt of all the approvable debts such as are (2) for wilful and malicious conversion of the property of another." 11 U.S.C. §35(a)(2).

As the Court stated in *In RE Hodges*, 4 BR 513 (1980), there was a change when the bankruptcy law was enacted in 1978 pursuant to the Bankruptcy Reform Act of that year. As the Court stated in that case:

> "It had become well settled by case law, part of the enactment of the Bankrutpcy Reform Act of 1978 that the proper construction to be placed on the parellel provision of the Bankruptcy Reform Acts §523(a)(6) - §17(a)(2) of the Act was the standard of 'reckless disregard'." See *Tinker v Colwell*, 193 U.S. 473, 24 S Ct 505, 48 L.ED., 754 (1904).
>
> "It was clear that an injury to an entity or property could have been malicious if it was wrongful and with-

> out just cause or excessive even absent personal hatred, spite or ill will." See *Tinker,* supra.

Where the Court said:

> "In order to come within the meaning as a judgment for wilful and malicious injury to personal property, it is not necessary that the cause of action be based on special malice so that without it the action could not be maintained."

The Court in *Hodges* went on to state that the *Tinker* standard of knowing disregard became settled law. However:

> "The House and Senate reports involving Legislative discussion of the implementation of the new Bankruptcy Code, the knowing disregard standard was expressly overruled. H.R. Rep. #595, 95th Congress, First Session, 363 (1977), S Rep. #989, 95 Congress, First Sess. 77-79 (1978), U.S. Code Cong. And Admin. News 1978, p.5787. (To the extent that *Tinker v Colwell,* 193 U.S. 473, 24 S Ct 505, 48 L.ED., 754 (1904) held that a looser standard is intended and to that extent the other cases have relied on *Tinker* to apply a reckless disregard standard, they are overruled. 3 Bankruptcy L.ED. §22:35 citing Legislative history §82:17, *Collier* notes the same fact that the reckless disregard standards in the cases that uphold the standard and constraint §17(a)(2) of the Bankruptcy Act are not applicable in interpreting §523(a)(6). 3 *Collier* 523.16(3) (15th Edition, 1979)." At p. 515.

The Sixth Circuit in this instant matter has seen fit to completely disregard the Legislative history and clear Legislative intent to overrule the *Tinker v Colwell* holding and to allow discharge of any debts unless those were proven to be wilful and malicious and wilful and malicious must be read in the conjunctive. See *In RE Hodges,* supra.

What the Sixth Circuit Court of Appeals has done is to simply disregard the clear intent of Congress as expressed in the Legislative history of the Bankruptcy Reform Act of 1978. As stated in other decisions interpreting the dischargeability issue as *In RE Adams*, 761 F2d 1422 (1985), other U.S. Courts of Appeals have recognized that some weight must be given to the Legislative history. See *May Department Stores Co. v Smith*, 572 F2d 1275, 1278 8th Cir (per curiam cert. denied 439 U.S. 837, 99 S CT 122, 58 L.ED 2nd 134 (1978). Quoting from p. 1426 of the *Adams* decision:

> "A subsequent amendment and its Legislative history, though not controlling is nonetheless entitled to substantial weight in construing the earlier law."

The Court of Appeals in the instant matter simply relied on the similarity between *In RE Franklin*, 615 F2d 609 10th Cir (1980). Finding the facts in the case before us that being *PERKINS v SCHARFFE* are very similar to the facts before the Court in *Franklin*. However, there was no discussion as to what facts in *PERKINS v SCHARFFE* were similar to the facts in *Franklin*.

It is Petitioner's contention that not only the Sixth Circuit misinterpreted Congress' clear intent but also has misinterpreted *In RE Franklin* and other decisions which Petitioner believes support the interpretation of 523(a)(6) as expressed herein.

Clearly *In RE Franklin* can be distinguished from the present situation. First and foremost, the judgment in *Franklin* was partially for punitive damages which are normally awarded for malicious or wanton conduct. In addition, the Court in *Franklin* simply deferred to the decision of the Bankruptcy Court which is directly contradictory to the holding of the Sixth Circuit in this matter.

The Court in *In RE Franklin* at p. 609:

> "The Bankruptcy Court as an independent trier of fact made its own determination, leaving the Court its op-

> portunity to review the termination only if it is found to be clearly erroneous and unsupportive by the evidence."

The Court went on to state:

> "That decision (referring to the Bankruptcy Court's final decision) upheld by the District Court is supportive by substantial evidence in the record and not clearly erroneous it must be affirmed."

Clearly the Court of Appeals in *In RE Franklin* in affirming the Bankruptcy Court's decision relied on the Bankruptcy Court as the finder of fact. However, in the present matter, the Sixth Circuit Court of Appeals would replace the Bankruptcy Court as the finder of fact.

Also in support of Petitioner's contention and contrary to the Sixth Circuit Court of Appeals decision in this matter is *In RE Dardar*, 620 F2d 39 (1980) which also arose under the old act. However, certainly its reasoning is applicable herein wherein the Court stated:

> "The initial determination which must be made is whether the beating by *Dardar* was wrongful or that it was justified because of petty prior acts."

Thus the Court in *Dardar* is making a two prong decision making process expressing the same logic as Judge Bernstein in his decision.

The first step in the determination must be whether the Debtor's actions were wrongful and the second step is whether those wrongful acts are clearly intentional acts which would necessarily lead to injury and without excuse or cause.

Clearly in a case of medical malpractice, the acts of malpractice must go beyond ordinary negligence and must be of such a nature that not only are the acts wrongful but they were clearly intended to lead to injury. There is no evidence to support this contention in this matter. Rather, the evidence as heard by Judge Bernstein supports only one conclusion and that is although DR. SCHARFFE'S actions might have been wrongful, they were

clearly not intended to injure Respondent and that DR. SCHARFFE proceeded on the course of action as he did with the intent of trying to help rather than harm Respondent.

That there is conflict between the Circuits is evident in such other decisions as *In RE Adams*, 761 F2d 1422 (1985), wherein the Court expressed the opinion that the amendment to the Bankruptcy Act contained in §523(a)(9) which made debts resulting from driving while intoxicated nondischargeable was clear and explicit and intended to clarify conflicting bankruptcy decisions under 523(a)(6). The Court went on to recognize that clear congressional intent must be given its effect and therefore no evidence that the judgment Debtor intended to injure anyone was necessary when drunk driving was involved. No such amendment to the statute has been added in the case of medical malpractice when Congress amended the Bankruptcy Code in 1984 and added the provisions of 523(a)(9).

Petitioner would also submit that *In RE Quezada*, 718 F2d 121 (1983) is a U.S. Court of Appeals case arising out of the 5th Circuit that is directly contrary to the Court of Appeals holding herein. In *Quezada*, the Court of Appeals found that a debt arising from the tortious conduct of the debtor to wit: a judgment for damages arising out of injuries inflicted by a pit bull dog owned by the Quezadas and which dog had previously bitten a child. The Circuit ruled that:

> "In 1978 §523(a)(6), Congress expressly intended to overrule Legislatively the reckless disregard test for nondischargeability." See p. 122.

The Court in *Quezada* went on to affirm the decision of the Bankruptcy Court for dischargeability as not being within the exception of "willful and malicious injury by the debtor within the meaning of §523(a)(6).

In addition, there is clearly a split of authority amongst the various District Courts and the Bankruptcy Court regarding the nondischargeability issue under 11 U.S.C. 523(A)(6).

Judge Bernstein. in fact, in his decision, relied on a trend of case such as *In RE Ceccini*, 786 F2D 140, 9TH CIR (1986) as clear precedent for a requirement that there must be a factual showing that the actions of the Debtor were intended to harm the victim.

Another case which is almost identical factually to the instant matter is *In RE Tanner*, 31 Bankruptcy Reporter, 338 (Bankruptcy Florida 1983) wherein the Court held that the exception to dischargeability are to be narrowly and strictly construed in favor of the Debtor and that there must be a clear and convincing showing of the intent to harm the Creditor for proving nondischargeability of the debt. In addition, the act must be wrongful and without just cause or clearly excessive. Here DR. SCHARFFE'S acts, no matter what, were intended to help and not harm Respondent. According to *In RE Tanner* at p. 339:

> "In order for this Court to find the judgment debt to be nondischargeable, the Plaintiff must prove by clear and convincing evidence that the Debtor performed surgery upon the foot of the Plaintiff Morales with intent to injure Mr. Morales. That the surgery was intended when performed without just cause or excuse and that he knew he would injure Mr. Morales and performed the surgery in the face of that knowledge."

The Court in *In RE Tanner* went on to state at length:

> "Based upon all the evidence presented and resolving all conflicts and connection, the Court finds that the Plaintiffs have failed to sustain the burden of proof and fail to prove by clear and convincing evidence that the Debtor's specific wilful and malicious intent to injure Mr. Morales during surgery. The Court is constrained to apply the laws in accordance with congressional intent. It is not the province of this Court to legislate. Accordingly, the Court must find that the judgment is not a debt for wilful and malicious injuries contemplated by

> the Bankruptcy Code §523(a)(6) and that such is dischargeable."

The Court, it if examines the facts of *In RE Tanner*, will note that it concerned podiatry treatment negligently performed, and that result is directly contrary to the decision for which review is now sought.

The distinction between *In RE Franklin* and the present matter is that the State Court judgment of intentional misconduct was found to be res judicata. Here, there is no State Court decision which would be res judicata on the parties. The Sixth Circuit Court in *SCHARFFE* further ignores that *In RE Franklin* was decided under statute preceding the present Bankruptcy Act. In addition the facts in *In RE Franklin* presented extraordinary circumstances. Not only was the malpractice blatant and the injuries catastrophic but the record revealed that the doctor intentionally destroyed records to cover up his errors. Those extremes in combination with the standard of nondischargeability under the then existing act lead to the Court's determination.

It is also Petitioner's position that this Court must review and give guidance on a question which affects possibly hundreds, maybe thousands of actual or potential applicants of the protection of the Bankruptcy Court. No clear guidance has been given on this question since the *Tinker v Colwell* decision of 1904, which this Court would do well to remember was the case involving criminal conversation which the Supreme Court of that era determined was nondischargeable and set a whole precedent for nondischargeability cases, none of which have been re-examined by this Court in light of the Bankruptcy Reform Act of 1978. The language in the Act is clear and unambiguous. Quoting once again from Legislative history:

> "Except that for wilful and malicious injury by the Debtor to another person of the property of another person within this paragraph . . . to the extent that other cases have relied on *Tinker* to express a reckless disregard standard, they are overruled."

All acts by their nature require some requisite degree of an intent even though often times the result is not what the intent had been. Here, DR. SCHARFFE certainly intended the acts that he did but he never intended any harm to come to MRS. PERKINS, instead, quite the contrary, intended to help her and treat her. Clearly this distinguishes the present situation from the situation such as *In the Matter of Klix,* 23 BR 187 (1987) and *In the Matter of Wooten,* (Bank Ct N.D. Alabama, 1983) where the debtor proceeded deliberately and intentionally in the face of knowledge intending the consequences of the act knowing it would harm the creditor. DR. SCHARFFE did not know that his treatments to MS. PERKINS were going to harm her and what the Court of Appeals has done is to allow an expert to replace the Judge as a trier of fact.

Inherent in this situation are possible violations of due process and equal protection of the law as guaranteed by the Constitution and Bill Of Rights. Clearly what we have in the present case is testimony by Respondents' expert who in this case was a crusader in the podiatric field who felt that anyone who violated accepted standards of treatment had to be punished and should not be allowed to escape that punishment through the relief of the Bankruptcy Courts. In this case, the expert was serving a sort of quasai judicial officer/jury/board of review in deciding that DR. SCHARFFE should have to pay a judgment pursuant to the expert's interpretation of the Bankruptcy Act. Clearly the door is left open in any medical malpractice case and numerous other tort situations involving ordinary negligence where a creditor/tort victim will hire an expert who can testify that the conduct of the debtor was so blatant in his acts of negligence that it would warrant that the debt must be determined to be nondischargeable.

Numerous times in their appeal brief, the PERKINS' lawyers contended that the Bankruptcy Court ignored the testimony of their expert Dr. Touchton who made numerous references to the acts of DR. SCHARFFE. See appellant brief, p.45. The logic

expressed in that brief is of an Alice In Wonderland type logic as expressed in their conclusion on p.48:

> "There is no requirments that the act specifically intend to harm a person."

What Respondents would impose is a standard of review for any negligent action where the Bankruptcy Court would review the decision of an expert such as Dr. Touchton and determine whether or not the expert was correct in deciding that the acts of the tort-feaser were so blatant as to be nondischargeable.

II.

The review of a Bankruptcy Court Trial Judge's decision by a Federal Court of Appeals wherein the Bankruptcy Court ruled that a debt was determined nondischargeable cannot subsequently be reversed by the Court of Appeals unless the Lower Court's decision is clearly erroneous.

The Court of Appeals in reversing the decision of not only Judge Bernstein, the Bankruptcy Judge, but also Judge Horace Gilmore, the District Court Judge who reviewed the matter, reviewed the record as submitted by Respondents on appeal. It must be remembered that Petitioner did not respond to any of the documents filed with the Court of Appeals.

The Court of Appeals as stated earlier herein, simply reversed relying on *In RE Franklin* as being a situation similar to the present case. However, nowhere in this decision does the Court of Appeals state what facts they found in the instant matter to be in line with the facts in *In RE Franklin* and Petitioner contends that the only decision *In RE Franklin* can support is a decision in his favor.

In Re Franklin as stated earlier was a case wherein the Court of Appeals simply relied on the earlier decision of the Bankruptcy Court Judge as being proper. *In RE Franklin,* can easily be distinguished from the present proceeding and Judge Bernstein focused on this in some detail in his opinion and order. Quoting from Judge Bernstein:

> "The debtor in *Franklin* was the surgeon who was held responsible for anesthesia given to a minor during an appendectomy. The plaintiff bank was the guardian of the minor's estate. The debtor failed to obtain any medical history as a part of surgery and over anesthetized the patient. The boy suffered cardiac arrest during surgery and was severely brain damaged as a result. Default judgment awarding compensatory damages was entered in State Court and a trial was held on the issue

> of punitive damages. Those damages were also awarded and affirmed on appeal.
>
> The primary issue presented in *In RE Franklin* involved the deference to be paid to State Court findings in proceedings, ie. whether a State Court judgment has res judicata or collateral effect. The discussion of wilful and malicious conduct under §17(a)(8), the act has very little applicability here because of the substantive changes reflected in the Legislative history of 523(a)(6) of the code. Those changes will be discussed below.
>
> The fact that *Franklin* presented extraordinary circumstances not only was the malpractice blatant and the injuries catastrophic but the record revealed that the doctor intentionally destroyed records to cover up his errors. Those extremes in combination with the looser standard for nondischargeability under the Act resulted in the Appellant Courts' affirmation of the Bankruptcy Court's finding of nondischargeability."

The question then becomes what is the standard for review by the Appellant Courts in a nondischargeability case. As the Court stated in *In RE Franklin* on p.609:

> "The Bankruptcy Court is an independent trier of fact and made its own determination leaving this Court the opportunity to review that determination only to be clearly erroneous and unsupported by the evidence."

And the Court went on at p.610 to state:

> "That decision (referring to the Bankruptcy Court's final decision) upheld by the District Court is supported by the substantial evidence in the record and not clearly erroneous and must be affirmed."

There was no showing at any level that Judge Bernstein's decision was clearly erroneous. As the Court stated in *In RE Tanner* at p.339:

> "In order for plaintiffs to prevail in their challenge to dischargeability of a debt, they must establish each element of the challenge by clear and convincing evidence ... In order to find the judgment debt to be nondischargeable, plaintiff must prove by clear and convincing evidence that either the debtor performed surgery on the feet of the plaintiff, Mr. Morales with the intent to deliberately injure Mr. Morales, that the surgery was intentionally performed without just cause or excuse or that the debtor knew he would injure Mr. Morales and perform that surgery in the face of that knowledge." See above cited cases.

> "Based upon all the evidence presented and resolving all conflicts in connection therewith, the Court finds that the plaintiffs have failed to sustain their burden of proof. They have failed to prove by clear and convincing evidence that the debtor had the specific wilful and malicious intent to injure Mr. Morales during surgery. The Court is constrained to apply the laws presently written and enacted in accordance with congressional intent. It is not the province of the Court to legislate. Accordingly, the Court must find that the judgment is not a debt for wilful and malicious injuries contemplated by the Bankruptcy Code §523(a)(6) and as such is dischargeable."

In *Coen v Zick*, 458 F2d 326 (1972), the 9th Circuit Court of Appeals succinctly stated the issue at p.328:

> "We may not set aside the findings of the referree which have been affirmed by the District Court unless those findings are clearly erroneous." *Monroe v Cussen*, 454 F2d 1151 (9th Cir 1972), Rule 52 (a) Federal Rules Of Civil Procedure.

Remembering also that *Coen* is a dischargeability case and therefore applicable to the present situation and the Court went on to state at p.328:

> "In the present case, the findings rest upon the written record of the proceedings of the Trial Court about which there is no question. Therefore, the only unresolved inquiries of whether that record taken is true constitutes sufficient proof to establish the judgment obtained by appellant against the bankruptcy and the State Court was based upon wilful and malicious acts of Coen.

The Bankruptcy Courts are governed by their own rules and the rule controlling this situation, which is Bankruptcy Rule 7052, refers back to Rule 52 of the Federal Rules Of Civil Procedure:

> "Rule 7052, Findings Of The Court, Rule 52 Federal Rules Of Civil Procedure applies in adversary proceedings.
>
> Rule 52. Findings of the Court.
>
> (a) Effect. In all the actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.* The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions

> of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." (Emphasis added)

Judge Bernstein's decision in this matter was a finding of fact given only after the Judge had an opportunity to hear all the testimony, all the arguments and after Judge Bernstein had the opportunity to judge the credibility of witnesses. As a matter of law, Judge Bernstein's decision must be given its proper controlling weight.

CONCLUSION

In conclusion, Petitioner asks that the Court review the issue of dischargeability for liabilities of the nature presented herein. As is apparent from the numerous Bankruptcy Court cases as well as District Court cases, in which this issue has arisen time and again and with the increase not only in the number of Bankruptcy Petitions but also in the number of professionals, not only podiatrists, but doctors, dentists and lawyers who have filed for protection of the Bankruptcy Act from liabilities incurred as a result of negligence or a malpractice claim. An answer to this question one day will be necessary.

Petitioner would point to what Judge Engle said in his concurring opinion of *PERKINS v SCHARFFE*:

> "Uniformity in this question is desirable because bankruptcy is an area in which 'it is more important that the applicable law be settled and it be settled right'." *Burnett v Coronado Oil & Gas Co.*, 285 US 393, 406 (1932) (Judge Brandies dissenting).

However, a reading of the context from which that quote is taken,

> "I agree with Mr. Justice Stone that the case was wrongfully decided and should now be frankly overruled. Merely to strictly construe this doctrine will not adequately protect the public revenues. Compare *Jaybird Min. Co. v Weir*, 271 U.S. 609, 70 L ED 1112, 46 S. Ct. 592.
>
> Stare decisis is not, like the rule of res judicata, a universal, inexorable command. 'The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.' *Hertz v Woodman*, 218 US 205, 212, 54 L Ed 1001, 1005, 30 S Ct 621. Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled

> than that it be settled right. Compare *National Bank v Whitney*, 103 US 99, 102, 26 L Ed 443,444. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."

Petitioner's major contention throughout this matter has been that the Legislature, that is Congress, has attempted to correct this error by the express overruling of *Tinker's* reckless disregard standard and this Court must give effect to this Congressional intent.

Respectfully submitted,

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APPENDIX

Opinion and Judgment of Court of Appeals

RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

No. 85-1555

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BETTY L. PERKINS and HARRY A. PERKINS,
Plaintiffs-Appellants,
v.
THOMAS L. SCHARFFE,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 5, 1987

Before: ENGEL and JONES, Circuit Judges; and ALLEN, Senior District Judge.*

ALLEN, Senior District Judge, delivered the opinion of the court, in which JONES, Circuit Judge, joined. ENGEL, Circuit Judge, (p. 6) delivered a separate concurring opinion.

PER CURIAM. This case arises as an appeal from a decision rendered by the United States District Court for the Eastern District of Michigan affirming an order of the United States Bankruptcy Court for that district.

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*The Honorable Charles M. Allen, Senior District Judge of the United States District Court for the Western District of Kentucky, sitting by designation.

Both the district Court and the bankruptcy court held that a judgment of $180,000.00, which the appellants had obtained against the appellee, was dischargeable in bankruptcy. Appellants contend that the judgment debt was nondischargeable under 11 U.S.C. § 523(a)(6)(1979). Section 523(a)(6) provides: A discharge under this title does not discharge an individual debtor from any debt "—for willful and malicious injury by the debtor to another entity or to the property of another entity."

This case had its genesis in the medical-podiatric treatment of appellant Betty L. Perkins by the appellee, Dr. Scharffe, which both the Bankruptcy and District Judges correctly characterized as being absolutely appalling. The proof showed that Dr. Scharffe unnecessarily injected Mrs. Perkins's left foot with an unsterile needle or contaminated medication. Thereafter, he failed to perform timely tests when resultant infection was apparent. Dr. Scharffe then ignored the results of belated tests that identified the offending bacteria and disclosed the appropriate drugs and drug strengths to combat them. Finally, Dr. Scharffe failed to hospitalize Mrs. Perkins when hospitalization was urgently needed.

Harry and Betty Perkins filed suit against Dr. Scharffe in the Bay County Court in Michigan. Dr. Scharffe filed a Chapter 7 petition with the bankruptcy court and after the automatic stay pursuant to 11 U.S.C. § 362 (1979) was removed, the Bay County action was concluded by a negotiated consent judgment of $180,000.00. That judgment specifically reserved the question of dischargeability for the bankruptcy court's consideration.

The resolution of this case depends upon the interpretation given to the terms "willful" and "malicious", which appear in § 523(a)(6). The committee notes to the statute provide that "willful" means deliberate or intentional. The bankruptcy courts that have decided this matter have been divided as to whether the statute requires an intentional act that results in injury or an act with intent to cause injury. Those

which follow the more lenient standard are: *In re DeRosa*, 20 Bankr. 307 (Bankr.S.D. N.Y. 1982); *In re Fussell*, 15 Bankr. 1016 (W.D. Va. 1981); *In re McGiboney*, 8 Bankr. 987 (Bankr.N.D. Ala. 1981). Those that follow the stricter standard are *In re Finnie*, 10 Bankr. 262 (Bankr.D.Mass., 1981); *In re Hinkle*, 9 Bankr. 283 (Bankr.D.Md. 1981); and *In re Graham*, 7 Bankr. 5 (Bankr.D.Nev. 1980).

The circuit courts, however, which have addressed this question have adopted the looser standard. *See In re Cecchini*, 780 F.2d 1440 (9th Cir. 1986); *In re Franklin*, 726 F.2d 606, 610 (10th Cir. 1984); *Matter of Quezada*, 718 F.2d 121, 123 (5th Cir. 1983); and *Seven Elves, Inc. v. Eskenazi*, 704 F.2d 241, 245 (5th Cir. 1983).

In re Franklin is particularly instructive as it involves facts somewhat similar to the facts in the case at bar. In that case, Paul Sanchez was admitted to the hospital for an appendectomy. The operation was performed by appellant who was an osteopathic surgeon. Cardiac arrest occurred during the surgery and Sanchez suffered extensive brain damage. 726 F.2d at 608.

Legal proceedings were initiated against Dr. Franklin alleging reckless and willful medical care and claiming compensatory and punitive damages. After a default judgment had been entered awarding both compensatory and punitive damages the state appellate court reversed the award of punitive damages and a trial was held on that issue and resulted in a general verdict awarding punitive damages to Paul Sanchez *Id.*

Both the bankruptcy court and the district court originally held that based upon the record and judgment in the state court, the debt owed was nondischargeable. The Tenth Circuit Court of Appeals reversed those rulings because of its opinion that the bankruptcy court in making a discharge determination was not limited to review of the state court judgment and record. *In re Franklin*, 615 F.2d 909 (10th Cir.

1980). The bankruptcy court on remand held that the appellant was liable for willful and malicious injury to the person of another and that the debt was not dischargeable. On direct appeal from the Bankruptcy Court, the appellate court affirmed the decision of the bankruptcy court. The Court of Appeals after citing § 523 noted that no definition is given in the statute for the terms "willful" and "malicious." The court went on to state that the notes of the committee, as well as case law, has provided the meaning of those words, and that the notes state that "willful" means "deliberate or intentional." The court then observed that other courts have generally held that "willful" and "malicious" requires the intentional doing of an act that necessarily leads to injury. It also observed that this definition was accepted in *Den Haerynck v. Thompson*, 228 F.2d 72 (10th Cir. 1955). *Id.* at 610.

The court in *Franklin* found that there was sufficient evidence to support the finding of the bankruptcy court that the actions of the appellant amounted to a willful disregard of his duty and a complete and total disregard of acceptable medical practice and, therefore, constituted willful and malicious conduct. The court noted that there was a finding that the appellant prescribed an anesthetic without a patient history, overinduced the patient with anesthesia, and covered up two records pertaining to the surgery and subsequent cardiac arrest. *Id.*

We find that the facts in the case before us are very similar to the facts before the court in *Franklin* and we therefore reach the same conclusion as did the court in that case. Our opinion is reinforced by the leading bankruptcy treatise, which states:

> In order to fall within the exception of section 523(a)(6), the injury to an entity or property must have been willful and malicious. An injury to an entity or property may be a malicious injury within this provision if it was wrongful and without just

> cause or excessive, even in the absence of personal hatred, spite, or ill-will. The word "willful" means "deliberate or intententional," a deliberate and intentional act which necessarily leads to injury. Therefore, a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury.

3 COLLIER ON BANKRUPTCY 523-111 (15th ed. 1986).

For the reasons given above, the decision of the District Court is reversed.

ENGEL, Circuit Judge, concurring. I concur because I agree that the result reached by the majority is largely consistent with the position taken by the circuits which have addressed this same question, see particularly *Wheeler v. Laudani*, 783 F.2d 610 (6th Cir. 1986); *In re Franklin*, 726 F.2d 606 (10th Cir. 1984); *In re Cecchini*, 780 F.2d 1440 (9th Cir. 1985). Uniformity on this question is desirable because bankruptcy is an area in which "it is more important that the applicable law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Were we writing upon an entirely clean slate, however, I would have been inclined to agree with United States District Judge Horace C. Gilmore's conclusion of dischargeability. The conduct which occasioned the judgment against the bankrupt doctor, while agreed by all to be "appalling" was not "willful and malicious injury," but instead constituted reckless disregard of a professional duty of care, a type of conduct which Congress indicated, at least in its legislative history, was even subject to dischargeability.[1]

---

[1] Paragraph 5 provides that debts for willful and malicious conversion or injury by the debtor to another entity or the property of another entity are nondischargeable. Under this paragraph "willful" means deliberate or intentional. To the extent that *Tinker v. Colwell*, 139 U.S. 473 (1902) [sic 193 U.S. 473 (1904)] held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 365, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5963, 6320-21; S. Rep. No. 989, 95th Cong., 1st Sess. 79, *reprinted in id.* at 5865.

Memorandum Opinion and Order

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:

THOMAS L. SCHARFFE, D.P.M.,
Debtor.

CASE NO. 84-01779-BE

BETTY L. PERKINS and
HARRY A. PERKINS,
Plaintiffs,

A.P. #84-0363-BE

v.

T. L. SCHARFFE, D.P.M.,
Defendant.

APPEARANCES:
FRANK M. QUINN
Counsel for Plaintiffs
Bay City, Michigan 48706

JOHN J. HEBERT, Esq.
Counsel for Defendant
Bay City, Michigan 48707

MEMORANDUM OPINION AND ORDER

STANLEY B. BERNSTEIN
U.S. Bankruptcy Judge

The plaintiffs in this proceeding seek a determination of nondischargeability of their claim against the debtor. That claim had been liquidated under a consent judgment in the plaintiffs' medical malpractice action against the defendant in state court.

The debtor is a licensed podiatrist. Plaintiff Betty Perkins started treatment for pain in several toes on her left foot with the debtor on August 25, 1980. The initial treatment by the debtor was noninvasive in nature, *i.e.*, the placing of wedges between toes and providing insoles for her shoes. On September 9, the debtor

injected the plaintiff's foot with a steroid and local anesthetic combination; within two days of that injection the plaintiff's foot displayed signs of infection.

Much of the testimony at trial concerned the circumstances surrounding the injection and the debtor's ensuing treatment. This included extensive expert testimony whether those actions conformed to the standard of care imposed upon podiatrists. This testimony was presented in support of the plaintiff's legal argument that this debt was nondischargeable if the debtor intended to do certain acts and those acts were negligently performed so that the injury which resulted could be considered willful or malicious.

Debts arising from tortious acts are generally dischargeable in bankruptcy. The exception to that general rule is found in 11 U.S.C. §523(a)(6):

> A discharge . . . does not discharge an individual debtor from any debt —
>
> * * * *
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity; . . .

The case law in this area has taken widely different views as to what constitutes "willful and malicious" under §523(a)(6). Much of this diversion has been caused by a strained construction of the Code in situations in which the court has determined, for policy reasons, that the debt *should* be nondischargeable. Most of these unconventional cases have dealt with personal injuries caused by intoxicated drivers.[1]

---

[1]Congress has responded to the policy expressed by many courts in these drunk driving cases. The 1984 amendments to the Code make nondischargeable judgments arising out of injuries caused by intoxicated drivers. P.A. 98-353, §371 amending 11 U.S. §523.

An excellent construction of §523(a)(6) was presented in *Morales v. Tanner (In re Tanner)*, 31 Bankr. Rptr. 339 (Bankr. S.D. Fla. 1983). The plaintiff sought a determination of nondischargeability for a judgment she had received in a medical malpractice action against the podiatrist debtor. The state court had awarded both compensory and punitive damages.

The *Tanner* court found that willful, as used in §523(a)(6), means intentional or deliberate, citing the legislative history. H.R. 95-595, 95 Cong., 1st Sess. 363 (1977), *reprinted in* [1978] U. S. Code Cong. & Admin. News 5787. As such, willfulness refers to an intentional act; a finding of negligence is not sufficient. 31 Bankr. Rptr. at 339. With respect to the interpretation of malicious, the court stated:

> Acts have been held to be 'malicious' pursuant to Bankruptcy Code Section 523(a)(6) if they are wrongful and without just cause or excessive, *In re La Brant*, or wrongful acts done without just cause or excuse, *In re Askew*, 22 B.R. 641 (M.D. Ga. 1982), *Matter of Grace*, 22 B.R. 653 (E.D. Wis. 1982). The case of *In re Donny*, 19 B.R. 354 (W.D. Wis. 1982) held that an injury is willful and malicious if the debtor knew that an injury would be caused and proceeded in the face of this knowledge to carry out the actions which would cause injury. Personal hatred and ill will are not elements of malice pursuant to Bankruptcy Code Section 523(a)(6). *Matter of Chambers*.

Id.

The plaintiff relies on *First National Bank of Albuquerque v. Franklin (In re Franklin)*, 726 F.2d 606 (10th Cir. 1984). Although *Franklin* also arises in a medical malpractice context, it is distinguishable from the present proceeding.

The debtor in *Franklin* was a surgeon who was held responsible for anesthesia given to a minor during an appendectomy. The

plaintiff bank was the guardian of the minor's estate. The debtor failed to obtain any medical history prior to surgery and over-anesthetized the patient. The boy suffered cardiac arrest during surgery and was severely brain damaged as a result. A default judgment awarding compensatory damages was entered in state court; a trial was held on the issue of punitive damages. Those damages were also awarded and affirmed on appeal.

The primary issue presented in *Franklin* involved the deference to be paid to state court findings in bankruptcy proceedings, *i.e.*, whether a state court judgment has res judicata or collateral estoppel effect. The discussion of willful and malicious conduct under §17a(8) of the Act has very little applicability here because of substantive changes reflected in the legislative history to §523(a)(6) of the Code; those changes will be discussed below.

The facts in *Franklin* presented extraordinary circumstances. Not only was the malpractice blatant and the injuries catastrophic, but the record revealed that the doctor had intentionally destroyed records to cover up his errors. Those extremes, in combination with the looser standard for nondischargeability under the Act, resulted in the appellate court's affirmation of the bankruptcy court's finding of nondischargeability.

The legislative history to §523(a)(6) of the Bankruptcy Code reveals a clear congressional rejection of the case law under the Act which grounded a finding of willful and malicious conduct upon negligence. As summarized in Colliers:

> An injury to an entity or property may be a malicious injury within this provision if it was wrongful and without just cause or excessive, even in the absence of personal hatred, spite or ill-will. The word "willful" means "deliberate or intentional", a deliberate and intentional act which necessarily leads to injury . . . .
>
> A claim or judgment based merely upon negligence does not necessarily constitute a willful and malicious

> injury within the exception even if the negligence is alleged to be reckless and wanton . . . Cases decided under section 17a(2) of the Bankruptcy Act, such as *Tinker v. Colwell* [193 U.S. 473 (1904)] holding that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.

3 Collier on Bankruptcy ¶523.16 at 523-118 — 523-122 (15th ed. 1979) (footnotes omitted). Congress intended to eliminate injuries caused by negligence from those debts deemed nondischargeable — even when the act of negligence is so reckless and wanton as to be characterized as gross negligence.

The record in this proceeding supports the finding that the debtor caused the infection by injecting an unsterile needle into the deep tissue of Mrs. Perkings' foot and that his treatment of that infection did not meet the appropriate standard of care. He failed to test the infected area in a timely manner; he failed to prescribe the drugs of choice required by the laboratory analysis; and he failed to hospitalize the plaintiff when further laboratory analysis showed that only hospital-strength antibiotics administered intravenously could combat the virulent infections. This Court, therefore, finds that the plaintiffs' injuries were caused by the debtor and that, under the tort law of this state, they are entitled to damages. No evidence was, however, admitted to support the finding that the debtor intended to harm Mrs. Perkins. Proof that the debtor injected an unsterile syringe and prescribed ineffective medications is not proof of willful and malicious injury. It is not the intent to inject the syringe or prescribe the medications that satisfies the statute; it is the intent to cause harm that has to be proven. Although this Court may regard the debtor's treatment of this plaintiff to be absolutely appalling, that conduct did not rise to the level of an intentional tort contemplated in §523(a)(6).

The Bankruptcy Code makes no special provision for the nondischargeability for damages caused by negligence. That policy may be ill-advised, but it is the law as it presently stands. *See Foell v. Hungate* (*In re Hungate*), 2 Bankr. Ct. Dec. 1046 (Bankr. E.D. Mich. 1976). The consent judgment entered into between these plaintiffs and the debtor is determined to be dischargeable.

IT IS SO ORDERED.

STANLEY B. BERNSTEIN
U. S. Bankruptcy Judge

Dated: August 2, 1984

Memorandum, Opinion, and
Order of Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:

THOMAS L. SCHARFFE, D.P.M.,
Debtor.

Case No. 84-01779-BE

BETTY L. PERKINS and
HARRY A. PERKINS,
Plaintiffs,

A.P. No. 84-0363-BE
Honorable Stanley B. Bernstein

vs.

T. L. SCHARFFE, D.P.M.,
Defendant.

NOTICE OF APPEAL

Betty L. Perkins and Harry A. Perkins, Plaintiffs, appeal to the District Court from the Final Order of Bankruptcy Court dated August 2, 1984, and entered in this adversary proceeding on the 3rd day of August, 1984. The parties to the Order appealed from and the names and addresses of their respective attorneys are as follows:

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Memorandum, Opinion, and
Order of Bankruptcy Court

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BY: (s) Frank M. Quinn (P19155)
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Dated: August 10, 1984

Memorandum Opinion, and
Order of Bankruptcy Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:

CASE NO. 84-3816

THOMAS L. SCHARFFE, DPM
Debtor,
BETTY L. PERKINS and
HARRY A. PERKINS,
Plaintiffs — Appellants,

-v-

THOMAS L. SCHARFFE,
Defendants — Appellee

COURT'S OPINION

PROCEEDINGS had and (excerpt) of the above-entitled matter before the Honorable Horace C. Gilmore, a U.S. District Judge, held Thursday, 8/25/85, Federal Building, 8th Floor; Detroit, Michigan 48226.

Appearances:

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On behalf Defendant — Appellee

Frank M. Quinn, *Attorney at Law*
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On behalf of Plaintiff — Appellant

Memorandum, Opinion, and Order of Bankruptcy Court

Detroit, Michigan
Thursday, August 25, 1985
Afternoon Session

JUDGE'S OPINION

THE COURT: Thank you both very much. This case is an appeal from the Bankruptcy Court proceeding involving a Dr. Scharffe, a pediatrist, appellants, and the Bankruptcy Court had held the debt to be dischargeable that arose out of an alleged medical malpractice were pretty bad, at least, the bankruptcy. It was absolutely appalling. The appellants are the creditors. A suit was filed in Wayne County Circuit Court alleging malpractice and was filed in Bankruptcy shortly after the case was scheduled to go to trail. After the automatic stay was lifted, the parties settled the case for a hundred and eighty thousand ($180,000) and now, there's a dischargeability of the judgment of bankruptcy after a hearing that the debt was dischargeable.

Now, there's a claim in the appeal that are on basically two grounds: First, in the standard, the debt is willful and malicious injury was improperly applied by the Bankruptcy Court and that certain evidence relating to the application of prior treatment of other patients in a similar way and similar results were excluded improperly. Now, 11 USC with reference to the first issue, whether the debt was properly discharged by Judge Bernstein, — 11 USC 526, exception to discharge and bankruptcy and it states specifically, a discharge does not discharge a individual debtor from any intent for willful and malicious injuries from a debt to the property of another entity and the bankruptcy judgment is that it is not the intent to inject a severing* that satisfies the statute and held that it was the intent to cause harm that has to be proven and held — he held that the actions even though it was grievious and and did not amount to a willful and malicious

injury, the appellant relies on Tinker versus Caldwell; but 193 US 473, a 1904 case, U.S. Supreme Court case, which applies reckless disregard standards negligent judjment in discharge bankruptcy debts.

However, I think it is clear in my mind, at least, that the Tinker case has been expressly overruled to the inactionment of 11 USC 526, the only authority is a 9th Circuit case that we have found is 1637 Reporter 671, 1984 case where that circuit's bankruptcy was appealed — held that the construction of the statute which allowed for a non-dischargeability of less dischargeability as expressly inactionment of 11 USC. So I doubt there is merit on this point and I will therefore affirm the bankruptcy on the standards used to determine malicious and willful with reference to the second issue, it's been conceded by the — If I adopt such a standard that, really, it would be similar acts would be irrelevant but I want to comment on it, anyway. The bankruptcy judge excluded evidence establishing sought to be offered which would show that five individuals had been harmed by this person and the four of them had filed civil actions which were later settled and dismissed. Now, I think in that case that even though it was error that excludes them, it was harmless error and there was the question as to whether it was admissible under 404 B. And, finally, I think probably the most — other than the one I think was erred in Congress as one is probative value outweighed by its prejudicial effect, Federal Rules of Evidence 403. For those reasons, I will affirm the determination of the Bankruptcy Court.

(Proceedings concluded.)

* * *

CERTIFICATE OF COURT REPORTER:

STATE OF MICHIGAN)
COUNTY OF WAYNE) SS
CITY OF DETROIT)

I, BERNEDA G. WILKINS, CSR 2240, reported the proceedings taken in the matter of Thomas L. Scharffe, DPM; Case No. 84-3816, before Honorable Horace C. Gilmore, a U.S. District Judge, Federal Court; held Thursday, 8/25/85; that the same was reduced to typewritten form under my supervision, and that the attached 5 pages constitute a full, true and accurate transcript of my stenotype notes.

(s) Berneda G. Wilkins
Court Reporter

Dated: Friday, October 11, 1985

Memorandum, Opinion, and
Order of Bankruptcy Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BETTY L. PERKINS
Plaintiff,

vs.

T. L. SCHARFFE
Defendant

CIVIL ACTION NO. 84-3816
BANKRUPTCY # 83-00204
ADVERSARY # 83-0283

ORDER AFFIRMING BANKRUPTCY COURT

At a session of said Court held in the United States Federal Courthouse, Detroit, Michigan, on May 31, 1985.

PRESENT: HONORABLE HORACE W. GILMORE
U.S. FEDERAL DISTRICT JUDGE

This matter being before this Court on appeal from the United States Bankruptcy Court of this district; briefs having been submitted and arguments of counsel being heard; IT IS ORDERED THAT the action of the Bankruptcy Court be affirmed.

(s) Horace W. Gilmore
United States District Judge

Memorandum, Opinion, and
Order of Bankruptcy Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:
THOMAS L. SCHARFFE, D.P.M.,
Debtor.
BETTY L. PERKINS and
HARRY A. PERKINS,
Plaintiffs-Appellants,

vs.

T. L. SCHARFFE,
Defendant-Appellee.

Bankruptcy Case
No. 84-01779-BE

Civil Action No. 84-381
Judge Gilmore
Bankruptcy Adversary Proceeding
No. 83-0283

United States Court of Appeals
for the Sixth Circuit
No. _____

NOTICE OF APPEAL

Notice is hereby given that creditors, Betty L. and Harry A. Perkins, do hereby appeal to the United States Court of Appeals for the Sixth Circuit from the order of the above-named District Court entered on May 31, 1985, granting to the above-named debtor, T. L. Scharffe, D.P.M., a discharge from the claim of Betty L. and Harry A. Perkins, and affirming the order of the Bankruptcy Court entered by the honorable Stanley B. Bernstein, Bankruptcy Judge for the Eastern District of Michigan. The Party to the Order appealed from and the name and address of his attorney are: Dr. T. L. Scharffe, D.P.M., Defendant-Appellee,

Attorney John J. Hebert, 309 Davidson Building, P.O. Box 835, Bay City, Michigan, 48707.

BRAUN, KENDRICK, FINKBEINER,
SCHAFER & MURPHY
Attorneys for Plaintiffs-Appellants

Dated: June 27, 1985

(s) Frank M. Quinn
FRANK M. QUINN (P19155)

and

(s) Daniel S. Opperman
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